IN THE

SUPREME COURT OF THE UNITED STATES

No. 572

METROPOLIS THEATRE COMPANY,
a New York Corporation,

Petitioner,

vs.

L. H. BARKHAUSEN and RANDOLPH BOHRER,
etc., et al.,

Respondents.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF THE PETITION.

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INDEX

AUTHORITIES CITED.

Tables of Cases.

* Cited in footnote.

TABLE OF STATUTES AND RULES.

TEXT BOOK AND PERIODICAL REFERENCES.

* Cited in footnote.

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PETITION FOR CERTIORARI.

Petitioner, Metropolis Theatre Company, a corporation, seeks this Court's writ of *certiorari* to review an affirmance by the Court of Appeals for the Seventh Circuit in the case of *Metropolis Theatre Company* v. *Barkhausen, et al.*, 170 F. 2d 481 (*Opinion*, Tr. 201-209, *judgment*, 210), of a judgment entered by the District Court for the Northern District of Illinois, Judge La Buy presiding. (*District Court judgment*, Tr. 175-177.) The District Court dismissed this suit for want of supposedly indispensable parties.

The Court of Appeals entered its judgment on November 11, 1948. Rehearing was denied on December 15, 1948.

Summary and Short Statement of the Matter Involved.

This case tenders the important question, delineated by the facts of this case, whether State or Federal law determines the indispensability of parties to a suit brought by petitioner for possession of its separately owned land and that part of a Chicago loop theatre and office building situated thereon, and for damages for occupation of petitioner's land and its part of the building by respondents, who petitioner says are trespassers.

Constitutional considerations and the construction of the Federal Rules Enabling Act of 1934[1] are involved. The moment of the question, which is *res nova* in this Court, is attested by a wealth of contemporary legal literature.[2]

The Court of Appeals, disregarding Illinois law relied upon by petitioner and citing and following its declaration in *De Korwin* v. *First National Bank,* 156 F. 2d. 858, that

> "indispensability must be determined by Federal rather than local rules",

held that the owners of the other portion of the building were indispensable parties, both as to so much of petitioner's suit as sought possession of petitioner's land and

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[1] U.S.C.A. Title 28, Sec. 723(b).

[2] For bibliography of contemporary law review articles on "Substance v. Procedure" in connection with the Rules of Federal Civil Procedure, see Fed. Rules Service (current material) page 491; see also discussion of Federal Enabling Act of 1934 as being a limitation on the new rules, in Cyc. of Fed. Procedure (1943) Vol. 3, Sec. 714, et seq.; see also (1948) 2nd Ed. of Moore Fed. Practice Vol. 2, page 30, which discusses "substantive rights" as used in the Enabling Act of 1934 Par. 4, et seq. We have found no article or text book which discusses Rule 19 (relating to indispensability of parties) in the light of (a) the 1934 Enabling Act provision which in effect makes all the new rules inapplicable as against "substantive right", or (b) Erie v. Tomkins with respect to "state created substantive rights".

the part of the building built thereon and as to so much of that suit as sought damages *in personam* for respondents' tortious occupancy. So holding, the Court of Appeals affirmed the District Court's dismissal of the suit for want of indispensable parties.

In thus conceiving that the Federal rules afforded the criterion of indispensability, the Court of Appeals has ruled contrary to the *rationale* of the decision in *McComb* v. *McCormack,* 159 F. 2d 219, in which the Court of Appeals for the Fifth Circuit, *grounding its decision as to indispensability of parties upon State law,* sustained the right of one of plural landowners to sue separately for possession and tortious occupancy of lands.[3] *County of Platte* v. *New Amsterdam Casualty Co.,* 6 F. R. D. 475, although only a District Court case, declares that

> "the indispensability of parties depends upon state law."

Petitioner further maintains that without regard to whether indispensability is to be determined by Federal or State law, the holding by the Court of Appeals that petitioner's suit must be dismissed *in toto,* both as to its claim for possession and as to its claim for monetary damages in which the owners of the other part of the building could have no conceivable legal interest, so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for an exercise of this court's supervision.

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[3] In Lawrence v. Sun Oil Co., 166 F. (2d) 466, the Court of Appeals for the Fifth Circuit, without distinguishing, explaining or overruling McComb v. McCormack, 159 F. (2d) 219, said that federal, not state, law determined indispensability but was at pains to point out that substantive interests were determinable by the law of Louisiana and that the question of joinder in that case would receive the same decision under either State or supposedly Federal law.

The specific complex of the rather intricate facts of this case, although vital to the merits, is not important to the basic question now presented,

> Does State or Federal Law determine the indispensability of parties to a suit for possession of real estate and for damages for its tortious occupation?

Nor is that complex important to the alternative question,

> No matter whether State or Federal law governs, did the Court of Appeals so far depart from historic principles of joinder as to call for certiorari?

Accordingly we here indicate only the nature of the controversy, detailing the facts, which are not in dispute at this juncture of the case, in an appendix to the Brief, *post*, pp. 35 to 40.

In 1924 petitioner owned a lot on Randolph Street in Chicago's Loop (Complt. Par. 9, Tr. 4). John R. Thompson, who is now deceased, separately owned the adjoining lot. Trustees under his will, who stand in his shoes, will be referred to as "the Thompson Trustees".

In that year petitioner and Thompson, each by a separately executed lease in which the other did not join, separately demised the lots in question to United Masonic Temple Corporation (Ex. A, Tr. 50; Ex. Q, Tr. 15). Both leases provided that there should be erected upon the two lots a single building of such construction that upon termination of the lease it could, without too great expense, be transformed into two separate buildings (Ex. A, Tr. 58, Par. Sixth; Ex. Q, Tr. 155). The lease contained explicit and detailed provisions that the building should be "capable of alteration into a separate building • • • along the lot line" (Tr. 59).

The original lessee is now extinct. Its leasehold was assigned to 32 West Randolph Street Building Corporation, which we hereafter call "Randolph" (Ex. B, Tr. 89).

The original lease provided that each lessor might *separately* re-enter his land and his part of the building thereon (Tr. 6, Par. 14 of Complt. Ex. A; Tr. 151, Ex. Q). This agreement was twice reaffirmed by instruments which, though they modified the lease in other particulars, explicitly preserved the right of each lessor separately to enter upon his land and his part of the building therein. (See Tr. references and quotation from the texts of the instruments in Appendix hereto, pp. 35 to 37, *post*).

Petitioner's suit charges that the ground lease has been breached in respects explained in detail in the Appendix, *post*, that the present occupation of petitioner's land and its portion of the building is tortious, and that respondents are liable to the petitioner (1) to turn over to petitioner its land and portion of the building and (2) to pay petitioner monetary damages for tortious occupancy of petitioner's real estate since January 1, 1946 (Complt. Pars. 43, 45, 39, 29).

The clearly applicable Illinois law discussed in the brief, *post*, recognizes that where a single building stands on two or more separately owned tracts of land

> "all questions arising between the parties, in regard to their respective rights in the lot and house, *are to be determined upon the same principles applicable to separate and independent proprietors of adjoining tracts of land.*" (Emphasis supplied). *McConnel* v. *Kibbe*, 43 Ill. 12, cited with approval and followed in *Stevenson* v. *Bachrach*, 172 Ill. 253, both cited and discussed in the Supporting Brief, Point II, *post*.

There is likewise no doubt that the Illinois Ejectment Act permits one of several plural owners of land to sue "to recover the possession thereof, or of some share, interest or portion thereof", without joining other own-

ers. (Ill. Ejectment Act, Secs. 4 and 5, Illinois Rev. Stats. Ch. 45 pars. 4 and 5, p. 211).

With respect to monetary damages recoverable by an *in personam* judgment, there is likewise no doubt that under the Illinois law petitioner could have sued respondents without joining the Thompson interests, since the Thompson interests were not parties to petitioner's lease and can not possibly share in the avails of any recovery. Indeed, until the enactment of the Illinois Civil Practice Act in 1934 (Ill. Stats. Anno., Ch. 110, par. 147, p. 141.) parties claiming rights under separate titles or instruments were *required* to sue separately and not jointly. Joinder of separate but similar claims by separate parties is now permitted but is not required.

Moreover, the leases and their subsequent modifications contractually recognize and confirm the separate rights of each lessor separately to recover possession of his portion of the building and separately to sue for monetary damages in the event of a breach of the lease. (See Appendix hereto, pp. 35 to 37, *post.*)

In short, the Thompson trustees have no title to petitioner's land or to its part of the building and no conceivable interest, legal or practical, direct or indirect, in the monetary damages of which petitioner seeks recovery.

Nevertheless the Court of Appeals, applying its conception of federal and not State law, has held (1) that the Thompson Trustees are indispensable parties, both as to the claim against trespassers for possession and as to the claim for damages, (2) that if joined, they would have to be aligned as plaintiffs, and (3) that therefore the suit must be dismissed *in toto*.

Statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

This Court has jurisdiction to review this case under the provisions of Section 1254, United States Judicial Code, which authorizes this Court's review of decisions of Courts of Appeals "By writ of *certiorari* granted upon the petition of any party to any civil • • • case, • • • after rendition of judgment" upon a petition presented "within 90 days after the entry of such judgment" in accordance with the provisions of Section 2101 of the Judicial Code.

The Questions Presented.

The questions presented are:

1. Is the matter of indispensability of parties to an action for the recovery of real estate to be determined as a matter of Federal adjective law, as the Court of Appeals has held, or as a matter of "substantive right" and as essentially a part of petitioner's real estate title under the State law, as petitioner contends?

2. Is the matter of indispensability of parties to a suit for monetary damages for tortious trespass upon and occupancy of real estate to be determined as a matter of Federal adjective law, or as a matter of "substantive right" and as essentially a part of petitioner's real estate title under the State law?

3 Irrespective of whether State or Federal law governs, did the Court of Appeals' holding that the Thompson trustees were indispensable parties, both as to petitioner's claim against trespassers for possession of real estate and as to its claim for dam-

ages for tortious occupancy thereof, so far depart from fundamental principles of joinder of parties as to call for *certiorari* and reversal?

Reasons Relied Upon for the Allowance of the Writ.

The question whether State or Federal law determines the indispensability of parties to actions (1) for possession of real estate and (2) for damages for the wrongful occupancy is an important question of jurisprudence which has not been but should be decided by this Court.

The *rationale* of the Court of Appeals' decision in this case and its earlier decision, cited and followed in this case, in *De Korwin* v. *First National Bank*, 156 F. 2d. 858, is in conflict with the *rationale* of the Fifth Circuit's decision in *McComb* v. *McCormack*, 159 F. 2d. 219, and is probably in conflict with the teachings of this Court's decisions which, while they are not precisely in point, are most nearly applicable. *Guaranty Trust Co.* v. *York*, 326 U. S. 99. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1.

"Renvoi" Considerations.

If, as the Court of Appeals for the Seventh Circuit declares, indispensability is determined in the Federal courts by considerations other than those obtaining in State courts, the following anomaly ensues:

Where a state rule forbids the joinder of parties because such parties' rights are separate and Federal law requires joinder of such parties because their rights are similar, a plaintiff's suit cannot be maintained in either court if joinder of the absent would result in a dismissal of the suit in the State court and their non-joinder would, on removal, result in dismissal in a Federal court. A

plaintiff joining such parties would incur dismissal in the State courts. If he did not join them, he would incur removal and dismissal in the Federal courts.

No such situation is involved in this case. But the decision of the Court of Appeals must be tested by its logical consequences as a principle of decision as well as by its application in the instant case.

The Court of Appeal's holding that the Thompson trustees must be joined, both as to petitioner's claim for possession and as to its claim for monetary damages in which the Thompson trustees have no interest, when the leases in question contractually and therefore substantively affirm and confirm petitioner's right to sue separately, is so far contrary to historic principles of joinder, both State and Federal, as to call for the Court's writ of *certiorari*.

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Respondents.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The Decisions Below.

The decision below is reported in 170 F. (2d) at page 481. The Court of Appeals' opinion appears in the transcript at pp. 201 to 209. The District Court's judgment appears therein at pp. 175 to 177.

Reference to the Petition, ante, for a Statement of the Grounds on which the Jurisdiction of this Court is Invoked and for a Statement of the Case.

The Petition, *ante*, contains "A Concise Statement of the Grounds On Which the Jurisdiction of this Court is Invoked" and presents, under the heading, "Summary and Short Statement of the Matter Involved", a "con-

cise statement of the case containing all that is material to a consideration of the issues," which are stated under the heading "Questions Presented".

Specification of Assigned Errors Intended to be Urged.

Petitioner has assigned and here specifies the following errors:

1. The Court of Appeals erred in treating the question: Are the Thompson trustees indispensable parties? as a question of Federal law. It should have treated the question as authoritatively ruled by Illinois real property law.

2. The Court of Appeals erred in holding, contrary to the substantive property law of Illinois and contrary to the historic principles of joinder of parties, that the Thompson interests were indispensable parties insofar as the complaint sought termination of the lease and possession of the property.

3. The Court of Appeals erred in holding, contrary to the substantive law of Illinois and contrary to the historic principles of joinder of parties, that the Thompson interests were indispensable parties in so far as the complaint sought damages *in personam* measured by petitioner's lease and modification thereof, to which lease and modifications the Thompson trustees were not parties.

SUMMARY OF ARGUMENT.

I.

The matter of indispensability of parties in an action for real estate or for damages for the wrongful occupation thereof is governed, *first*, by the substantive property and contractual right of the parties involved, and, *second*, by the policy that

> "the outcome of litigation in the Federal courts" shall "be substantially the same, so far as legal rules determine the outcome of litigation if tried in a State court." *Guaranty Trust Co.* v. *York*, 325 U. S. 99.

These considerations demonstrate that, contrary to the view of the Court of Appeals, the question of indispensability of parties in this case should have been governed by State law.

II.

Under Illinois law the separate owners of separate tracts of land, with a single building standing thereon, own such tracts and their respective portions of the building in severalty.

> "All questions between the parties in regard to their respective rights in the lot and house, are to be determined upon the same principles applicable to separate and independent proprietors of adjoining tracts of land." *McConnel* v. *Kibbe*, 43 Ill. 12, cited and followed in *Stevenson* v. *Bachrach*, 172 Ill. 253.

The Illinois Ejectment Act (Ill. Rev. Stats. 1947, Ch. 45, Pars. 4 and 5, p. 1505) specifically authorizes one of

several plural landowners to sue without joining the other owners. Indeed, until recent innovations in Illinois practice introduced by the Illinois Civil Practice Act (Ill. Rev. Stat. Anno. 1947, Ch. 110, Par. 147, p. 141) separate owners of several parcels of land not only need not, but *could* not join in ejectment. This was the law at the time the lease in question was made.

Therefore the Thompson trustees were not indispensable parties to so much of petitioner's suit as sought damages for its separately owned land and that portion of the building standing thereon.

III.

It is clear beyond peradventure that Illinois law has never required, indeed, until the enactment of the provision of the Practice Act above cited, it *did not even permit,* plaintiffs who sued in virtue of separate estates, separate contracts or other separate rights to join as plaintiffs in an action at law for damages, whether the action sounded in contract or in tort. So strict was this rule that owners of separate tracts of land offended by a single nuisance, or owners of separate items of personal property converted by a single transaction of the defendant, not only need not but could not join in a single suit for damages. Since the passage of the Practice Act, joinder in such cases, although permissible, is not mandatory. (See authorities cited and discussed, Point III, *post.*)

Therefore the Thompson trustees were not indispensable parties to so much of the petitioner's suit as sought monetary damages for tortious occupation of petitioner's separately owned real estate.

IV.

The Court of Appeals did not even mention, much less did it discuss or base its decision upon, the contractual provisions in the ground leases contemplating and providing for separate ownership, separate rights of termination, separate rights of re-entry, and physical separation of the legally separately owned portions of the building upon termination of the lease by default or otherwise.

It conceived it to be its duty to assay the total complex of facts and to determine, *as a matter of the judicial discretion of a federal court not constrained by State law,* whether the facts of the case and the relief sought were of such exigency that the joinder of the Thompson interests should be required if joinder was possible and that the suit should be dismissed if it was not possible.

But its proper task and duty was to recognize that under Illinois law petitioner's title was separate and to ascertain whether under Illinois, not federal, law, petitioner might sue respondent without joinder of Thompson trustees. Had it thus addressed itself to this case, it should and probably would have perceived that under Illinois law petitioner's interest was not joint but several. It should thereupon have permitted this suit to proceed without the Thompson trustees.

V.

This case presents an important question as to the demarcation of the boundaries between State and federal law. That question is one which has not been, but should be, decided by this court. There is a conflict

in the *rationale* of the decisions of lower courts upon this important question.

In any event, the Court of Appeals, in holding that the Thompson trustees must be joined in order to recover real estate in which they have no title and damages in which they have no interest, has so far departed from the accepted principles of joinder, State, Federal and general, as to call for this Court's supervision.

We submit that these considerations are of sufficient moment to evoke this Court's writ of *certiorari*.

ARGUMENT.

I.

The Court of Appeals decided the question of indispensability as one of Federal adjective law. It should have decided that question as one of state substantive law.

Under Points II and III, *post*, we demonstrate that under the statutory and decisional law of Illinois petitioner would have had the right to sue respondents for possession of petitioner's land and its portion of the building, or for damages for wrongful occupancy thereof, or for both such possession and such damages without impleading the Thompson trustees. These rights are important elements in petitioner's substantive title to Illinois real property.

But the Court of Appeals cited in this case, not the Illinois statutory provisions and the Illinois decisions relied upon by petitioner, but, *inter alia*, its own former decision in *De Korwin* v. *First National Bank*, 156 F. 2d. 858. In that case it had declared:

> "Notwithstanding defendants' suggestion to the contrary, we think the rule as to indispensability of parties must be determined by federal rather than local rules."

And the Court of Appeals, citing only federal cases, held that the Thompson interests were indispensable.[1]

[1] The Court of Appeals cites Rule 19. But that rule does not enact any criterion of indispensability. Since indispensability depends upon the character of substantive interest involved, it seems clear that the Court of Appeals consulted, not Rule 19, but some supposed *corpus juris federalis* of the sort that is extirpated by **Erie R. R. v. Tomkins**, 304 U.S. 64.

Needless to say, petitioner challenges, not the validity of Rule 19, but the Court of Appeals' application of that Rule in such a way as to deprive petitioner of substantive rights created by State Law and protected by the Enabling Act and the Constitution.

Since the Court of Appeals also held that the Thompson trustees would have to be aligned as plaintiffs, and since the Thompson Trustees are co-citizens of some of the respondents, the result of the Court of Appeals' decision is to frustrate petitioner's right of access to the Federal courts and to remit petitioner to the State courts, *in which petitioner can sue the respondents without joining the Thompson trustees.*

The Court of Appeals for the Fifth Circuit has held, *basing its decision on the law of Texas,* that one of several co-owners of land may sue in the federal courts without joining other co-owners whose presence would destroy diversity and oust jurisdiction. *McComb* v. *McCormack,* 159 F. 2d 219.

There is thus a direct conflict in the *rationale* of the Court of Appeals for the Seventh and for the Fifth Circuits as to whether in actions for possession of land or for damages for the unlawful occupancy thereof, the question of indispensable parties is to be solved by State or by Federal law.[2]

"The intent of *Erie R. R. Co.* v. *Tomkins* [304 U. S. 64]," this court said in *Guaranty Trust Co.* v. *York,* 326 U. S. 99,

> "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of litigation in the federal courts should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a State court."

[2] In Lawrence v. Sun Oil Co., 166 F. (2d) 466, the Fifth Circuit Court regarded the question of joinder as one of Federal, not State, law but rendered the point academic by finding no conflict between federal and State law. And, unlike the Court of Appeals in the instant case, it consulted as authoritative the substantive real property law of Louisiana in defining and declaring the substantive rights of the parties, upon which substantive rights it said that the question of indispensability depended.

Since Illinois law would permit the present suit without joinder of the Thompson interests, "the intent of *Erie R. R.* v. *Tomkins,*" which was to "insure that • • • the outcome of litigation in the federal courts should be substantially the same • • • as it would be if tried in a State court" has been defeated by the Court of Appeals in the instant case.

In *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, this court said that Congress

> "has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution." (p. 10.)

Defining the scope of the Enabling Act under which the Rules of Civil Procedure have been promulgated, the Court further said in the *Sibbach* case:

> "Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge, nor modify substantive rights', in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe rules which might have been but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute."

Hence, under the *Sibbach case,* the cardinal question presented may thus be stated: Is the right of an owner of real estate to (a) eject a trespasser and (b) sue him

for damages so inherently and essentially a part of the owner's real estate title, created and recognized by State law, as to be comprised within "substantive rights" recognized by this Court as constitutional in *Erie R. R.* v. *Tomkins,* 304 U. S. 64, and by the Enabling Act of 1934?

In *Cities Service Co.* v. *Dunlap,* 308 U. S. 208, this Court held that in a suit to quiet title to real estate, the matter of "burden of proof" on the issue whether the defendant was or was not a *bona fide* purchaser for value and without notice must be determined by the State, not federal law. Reversing a holding to the contrary by the Court of Appeals, this Court said (at page 212):

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a *bona fide* purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title."

Commenting on *Guaranty Trust Co.* v. *York,* this Court said in *Holmberg* v. *Armbrecht,* 327 U. S. 392, that the test as to whether State or federal law governs is not a matter of "the content which abstract analysis may attribute to 'substance' and procedure" but whether the State rule is "significant in enforcing a State created right."

Both the Court's opinion and Mr. Justice Holmes' dissent in *Kuhn* v. *Fairmont Coal Co.,* 215 U.S. 349, are incisively pertinent. In that case, which was decided before *Erie R. R.* v. *Tompkins,* 304 U.S. 64, and before the passage of the Enabling Act, the ultimate question was whether one who had purchased coal rights under the

plaintiff's land was bound, absent specific provisions in the deed, to leave sufficient coal to support the land to which the coal was subjacent. A decision of the Supreme Court of West Virginia, announced "*after* the contract upon which the defendant relies was executed, *after* the injury complained of was sustained and *after* this action was instituted", was decisive of the question so far as the State law was concerned. All of the members of the Court agreed that if the West Virginia law had been settled before the deed was executed, a Federal court, even before *Erie R. R.* v. *Tomkins,* would have been bound to apply the law of the State. A majority of the Court, however, italicizing the word "after" in the language above quoted, held that the Federal courts were not bound to give retrospective effect to the West Virginia decision. But Mr. Justice Holmes, with whom Justices White and McKenna concurred, dissented. Mr. Justice Holmes said, at page 370:

> "This is a question of the title to real estate. It does not matter in what form of action it arises; the decision must be the same in an action of tort that it would be in a writ of right* * *. The title to real estate in general depends upon the statutes and decisions of the State within which it lies. I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land, how much he owns and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them, do not follow what for all ordinary purposes is the law."

The *Cities Service* case and the *Kuhns* case are applicable here because in the case at bar the ground leases were executed many years after the Illinois decisions hereinafter discussed.

"Legal title" to real estate is no more than a concept that subsumes the right to vindicate the beneficial interests in land that collectively constitute "ownership". Basic indeed is the right to recover, by process of law which has superseded self-help since Norman times, possession of lands. Hardly less basic is the right to recover money, whether by way of damages for tortious occupancy or by way of rent, for the possession of lands by another.

The decision of the Court of Appeals, which declares that the Thompson trustees must be joined as plaintiffs but cannot be joined because joinder would destroy jurisdictionally requisite diversity, denies to petitioner the right to vindicate in the federal courts its rights *in rem* and *in personam*.

II.

Under Illinois Law, as well as under federal decisions and general authority, petitioner's suit for possession of its own land and its part of the building thereon could have been maintained without joinder of the Thompson interests.

Two Illinois cases, *McConnel* v. *Kibbe*, 43 Ill. 12, and *Stevenson* v. *Bachrach*, 172 Ill. 253, make it clear that adjoining owners of land and of separate parts of a single building hold their separate parts in severalty.

In the first of these cases, *McConnel* v. *Kibbe*, 43 Ill. 12, one of the parties owned the ground floor of the building, the other party owning the upper portion of the building. There were covenants as to support of the upper portion of the building.

The owner of the upper part of the building brought a suit to have the entire building sold as upon a partition and the proceeds divided.

The Supreme Court of Illinois, although it recognized that the "condition of the property" was "anomalous, and causing much irritation and litigation between the parties", nevertheless declared:

> "Portions of the premises particularly described belong in severalty to each of these parties, and no portion of it jointly to both".

The court sustained the defendant's contention that

> "• • • all questions arising between the parties, in regard to their respective rights in the lot and house, *are to be determined upon the same principles applicable to seperate and independent proprietors of adjoining tracts of land.*" (Emphasis supplied.)

In *Stevenson* v. *Bachrach,* 170 Ill. 253, the plaintiff and the defendant owned, respectively, different parts of the same single building erected upon their separately owned tracts of land. The court, citing, approving, and following *McConnel* v. *Kibbe,* discussed above, held that each party owned in severalty his part of the building and the land upon which it stood. Thus there is no doubt under Illinois law that in the instant case petitioner owns its land and its portion of the building in severalty and not in common or jointly with the Thompson interests.

The first of the two cases cited above was decided in 1867 and the second of them was decided in 1897. In 1924, therefore, when the instant lease was made, this law was well settled.

But the parties, not content merely to rely upon this familiar and well established principle of the common law, *contractually* agreed that each should have the right separately to re-enter his separately owned land and its portion of the building thereon. (See *Appendix, post,* for more detailed discussion of and quotation from these explicit agreements.)

This agreement was embodied in the original lease, confirmed in 1935 by an instrument which modified the lease in other respects but not in this one, and again confirmed in 1939, when the ground lease was again modified in other respects. (*Appendix, post,* pp. 35 to 37.)

Petitioner therefore maintains that its separate right of ownership of land and of its part of the building thereon, with the corollary right separately to recover its portion of the premises, is a substantive right both because it is inherent in its estate in severalty and because it has been embodied in a contract.

Sections 4 and 5 of the Illinois Ejectment Act recognize the right of one of several owners of land to sue for "his share" thereof without joining his fellow owners:

> "Sec. 4. *Interest Required to Maintain Action.*
>
> "No person shall recover in ejectment unless he has at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, *or of some share, interest or portion thereof,* to be proved and established at the trial.
>
> Sec. 5. *Joint Tenants, etc., Joint or Several Suits.*
>
> "Any two or more persons claiming the same premises as joint tenants, tenants in common or co-parceners, may join in a suit for the recovery thereof, *or any one may sue alone for his share.*" (Emphasis supplied).

If, as these provisions enact, one of several "tenants in common or joint tenants, or co-parceners" can sue without joining his co-tenants, *a fortiori* one whose interest is separate, several and distinct may so sue.

The Court of Appeals, in the opinion below, gave no consideration to the Illinois law developed under this

Point. Therefore the Court of Appeals denied to petitioner a right guaranteed to it by the Constitution of the United States (*Erie R. R.* v. *Tomkins,* 304 U. S. 64) and confirmed by the Enabling Act under which the Federal Rules of Civil Procedure have been promulgated. (See Point I, *ante*).

But without regard to whether the Court of Appeals should have conceived the question of joinder in terms of Illinois law or of Federal law, its decision is wrong.

In *Willard* v. *Tayloe,* 75 U. S. 557, the Supreme Court of the United States held that a plaintiff, asserting in equity a claim of right to lands against one in possession, need not join his brother, to whom he had assigned one-half of the rents.

In *Davis* v. *Coblens,* 174 U.S. 719, this Court recognized that in ejectment the practice is to permit one of several owners of a tract of land "to sue either jointly or severally as they may elect." The several courts of appeals have often held that one of several owners of land may sue for possession without joining his co-owners.[1] In dismissing petitioner's suit for possession the Court of Appeals not only disregarded petitioner's substantive rights under Illinois law but so far departed from the historic principles of joinder as to call for this court's writ of *certiorari.*

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[1] In each of the following cases it was held that one or less than all of the plural owners of a tract of land might sue for possession thereof in a suit in the nature of an action of ejectment:

Chidester v. City of Newark (3rd Circ.), 162 F (2d) 598.
McComb v. McCormack, 159 F (2d) 219.
Whittle v. Artis, 55 Fed. 919.
Rose v. Saunders, 69 F. (2d) 339.

III.

The complaint stated a cause of action for monetary damages which, both by the Illinois law and on general principles, was justiciable in the absence of the Thompson trustees.

The Illinois Civil Practice Act contains permissive, not mandatory, provisions which allow but do not compel "all persons" to "join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative" (Ill. Stats. Ann., Ch. 110, Par. 147, p. 141). Under this statute doubtless petitioner and the Thompson trustees could, if they so chose, join in a single action in the State courts. But nothing in this statute requires such joinder if it were not required at common law.

There is no doubt whatever that under the common law of Illinois, parties asserting claims in virtue of separate titles, separate contracts or other separate bases of legal right not only need not but *could not* join in a single action at law. This was so even though their rights were similar and arose out of a single transaction or series of transactions. Authorities making this clear are cited in the margin.[1]

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[1] Several inhabitants of a neighborhood could not sue jointly for the annoyance caused by a single nuisance although each plaintiff complained of identical acts. **Lindblom v. Purity Ice Co.**, 217 Ill. App. 306.

So strict was the rule that where a defendant seized luggage containing articles of apparel, some of which belonged to the husband and some of which belonged to the wife, the suit was dismissed on the sole ground of misjoinder. **Mitchell v. Helsen**, 169 Ill. App. 531.

In **Moore v. Terhune**, 161 Ill. App. 155, the plaintiffs laborers were employed by separate contracts "to plaster a house for plaintiff in error." They joined in a single action for their wages, which they claimed upon similar contracts. The court reversed a judgment for the plaintiff for misjoinder. The court said, at page 156:

But suppose that the question were not one of Illinois law. We do not multiply citations sustaining the inveterate principle of common law that parties claiming under separate titles, under separate contracts, or otherwise by virtue of several interests not only might but *must* sue separately. We quote, not as authoritative, but simply as a compendious statement of well-settled principles long familiar to this court, the following text from Corpus Juris, Vol. 47, "Parties", p. 54.

"Sec. 109 b. At Common law—(1) In General.

"Each person injured must, at common law, sue separately where the damages, as well as the interest, are several; hence, different persons who have distinct and separate claims, although they stand in the same relative situation, or whose legal interests are several, if there is no express contract with them jointly, must sue severally."

"It is elementary that an action at law can only be maintained by the party or parties in whom the legal title exists, and no party should be joined as plaintiff who has not a joint interest with the other plaintiffs in the subject of litigation in actions ex contractu. Dix v. Mercantile Ins. Co., 22 Ill. 272; Frye v. Bank of Ill., 5 Gilm. 332."

In Starrett v. Gault, 165 Ill. 99, the Illinois Supreme Court, authoritatively expounding Illinois substantive law of contracts, as well as that State's adjective law, considered a case where a client had, by separate contracts, employed each of two attorneys who were not partners to represent her in litigation. The two attorneys joined in a single action to recover their fees for services rendered in joint cooperation. They recovered a judgment in the trial court. The Supreme Court of Illinois reversed, holding that the two lawyers, far from being required to join, were not even permitted to do so.

Prior to the advent of the Illinois Civil Practice Act in 1934 the classical exposition of Illinois procedure in actions at law was Puterbaugh's Common Law Pleading. This text was to the Illinois practitioner in its authority, if not in its merits as a synthesis and critique of common law jurisprudence, what Blackstone and Kent were to the eighteenth century lawyer. Puterbaugh thus states the Illinois rule as of 1926 (Section 17, p. 11):

"Where the interests are several there can, as a rule, be no joinder, even where the rights of the plaintiffs have been violated by one and the same wrongful act on the part of the defendant."

This Court held in *Hall* v. *Leigh*, 8 Cranch, 50, 12 U. S. 50, that where each of two owners contributed from his separate property a moiety of grain, though the grain was shipped in a single consignment to the purchasers, each owner might sue separately since their contract provided that defendants purchased separately from each of the plaintiffs. This Court, speaking of the defendants, said at p. 22:

> "By their own conduct they have precluded themselves from every objection of this nature, for they have contracted, as to the one half of this property with the plaintiff, and as to the other moiety, with William Potts & Co., and it will be seen by a recurrence to the testimony, not only that their engagements with these parties are distinct, but of different kinds."

The right to recover damages for the tortious occupancy of petitioner's land and its portion of the building is an essential part of petitioner's legal title. Under Illinois law, Thompson had no legal interest in that right. He was not an indispensable party to a suit seeking this enforcement.

The Court of Appeals should have consulted and applied the law of Illinois, not its own conception of federal jurisprudence, and should not have held that the Thompson trustees were indispensable. Without regard to whether the question is one of State, federal or "general" law, the Court of Appeals' decision so far departed from the accepted principles of law as to call for this courts' writ of *certiorari*.

IV.

The opinion of the Court of Appeals misconceived the applicable principles of joinder of parties because it ignored Illinois law as affording the criterion of indispensability.

The opinion of the Court of Appeals makes it clear that that Court conceived it to be its duty to assay the total complex of facts and to determine, *as a matter of the judicial discretion of a federal court not constrained by State law,* whether the facts of the case and the relief sought were of such exigency that the joinder of the Thompson interests should be required if joinder was possible and that the suit should be dismissed if it was not possible.

The Court of Appeals did not even mention, much less did it discuss or predicate its decision upon, the provisions of the ground leases or the amendments thereto by which the rights of petitioner separately to terminate its lease in the event of default, separately to recover its land and the portion of the building situated thereon, and separately to recover its monetary damages were explicitly declared. (*Appendix,* pp. 35 to 37, *post.*)

Petitioner maintains that it was not the task of the District Court and the Court of Appeals to determine whether in the discretion of those courts the parties should be remitted to the State courts because the Thompson trustees could not be joined in the Federal courts. Rather the lower courts' duty was to recognize that under the Illinois law petitioner's title was separate and to ascertain whether under Illinois law petitioner might therefore sue respondents without joinder of the Thompson trustees. Had the Court thus addressed itself

to this case, it would have perceived that under Illinois law petitioner's interest was *not* joint, but several. It should thereupon have permitted this suit to proceed without the Thompson trustees.

But if the Court of Appeals' opinion may be read as intimating (it does not expressly declare) that petitioner's rights, either with respect to the whole of the building or with respect to the theatre portion of the building, were in some manner fused or merged so as to render petitioner and the Thompson trustees co-owners or co-lessors of the whole of the building or of the theatre, either of two responses to that suggestion would, we submit, be conclusive:

In the *first* place, it is demonstrated in the Appendix, *post,* that petitioner and the Thompson trustees, each respectively, explicitly disavowed any intention of becoming a co-lessor of the other with respect to the premises or any part thereof. Indeed, in 1940, the Thompson trustees wrote a letter similar to a letter written on November 10, 1938, by petitioner, except that Thompson's letter was even stronger in its disclaimer of any intention to become in any way a lessor under the theatre lease, expressly and emphatically providing that nothing should be construed so as to constitute Thompson a lessor under the theatre lease and asserting their separate and several right in their land and that portion of the building standing thereon. (See *Appendix,* pp. 35 to 37 and 40, *post.*)

But in the *second* place, even if petitioner and the Thompson trustees were to be treated for the purpose of this litigation as co-owners of the land and building as an entirety or as co-lessors of the theatre, instead of separate owners of separate tracts and of the portions

of the building, respectively, standing upon such separate tracts, the authorities cited under Point II, *ante*, demonstrate that neither would be an indispensable party to a suit brought by the other for possession of the premises. And no matter what mutual, reciprocal, or even joint interests might be imputed to petitioner and the Thompson trustees with respect to the entire land and building, the authorities cited under Point III, *ante*, demonstrate that inasmuch as the Thompson trustees would have no conceivable interest in damages measured by petitioner's separate lease and payable to petitioner severally, they could not be indispensable parties to a suit brought for the recovery of such damages.

The Court of Appeals, after stating that there is no dispute as to the facts, ignores entirely the fact, *controlling* under Illinois property law, that petitioner and the Thompson trustees *contractually agreed and engaged* that petitioner, as well as Thompson and his trustees, should have the right separately to terminate their separate leases, separably to regain their separate lands and portions of the building, and separately to recover damages for tortious occupation.

The parties were mature, sophisticated business men. They contemplated whatever anomaly there is in separate ownership of separable parts of an integrated building and nevertheless contracted for rights of separate termination, separate re-entry and separate monetary recovery. *McConnel* v. *Kibbe*, 43 Ill. 12, and *Stevenson* v. *Bachrach*, 170 Ill. 253, both discussed under Point II, *ante*, recognize the validity of agreements such as this one.

The decision of the Court of Appeals therefore deprived petitioner of property and contractual rights preserved to it by the Enabling Act and denied rights which,

arising under State law, are guaranteed by the Constitution of the United States.

V.

If petitioner's complaint would have supported a judgment for any relief, at law or in equity, in the absence of its Thompson interest, it was error to dismiss it for want of jurisdiction.

The proposition stated above, although vital to this case, is axiomatic. It is sustained by the authorities cited in the margin.[1] We do not labor it.

Under Points II and III, *ante,* we demonstrate that this complaint pleaded facts constituting a common law action for possession (Point II) and for *in personam* damages (Point III) in which the Thompson trustees had no legal interest—indeed, in which they not only need not join with petitioner, but until recent innovations in State and Federal practice *could not* have joined with it, at least in an action at law; for several creditors, holding separate claims due upon separate contracts or arising out of wrongful acts with respect to separate tracts of land, could never have joined in an action at law until modern changes in Federal and State practice even though the claims were similar.

It is immaterial whether the complaint was entitled an action of ejectment, an action of trespass, or a complaint in equity. It was error to dismiss it for want of indispensable parties when its averments, if proved or admitted, would have supported any relief.

---

[1] "The motion" (to dismiss for want of jurisdiction) "should not be granted if the Complaint states any cause of action against the defendants whether at law or in equity." **Hughes Federal Practice,** Section 18,564. **Chappel v. First Trust Co.,** 30 F. Sup. 763, although only a District Court case, discusses and treats this axiom of State Code pleading under the new Rules of Federal Procedure.

VI.

This Case is of Sufficient Importance to Elicit this Court's Writ of Certiorari.

We are mindful that "review on writ of *certiorari* is not a matter or right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". (*This Court's Rule 38.*) We therefore deem it proper to suggest those considerations which we think should prevail upon the Court to grant *certiorari* in this case.

This Court has never decided whether State or Federal law determines the indispensability of parties to a suit for the recovery of real estate or for damages for the wrongful occupancy thereof. The question is one of moment in the demarcation of the boundaries between State and Federal law.

The Court of Appeals for the Seventh Circuit regards the question of indispensability of parties as one of Federal law. The Court of Appeals for the Fifth Circuit has viewed this question as determinable by the law of the State.

Thus this case presents an important question which has not been, but should be, settled by this Court and with respect to which opinions from the Courts of Appeals of at least two circuits are in disagreement.

Wholly apart from this important question, the Court of Appeals, in holding that the Thompson trustees must be joined even though they have no title to petitioner's portion of the building and no possible interest in its claim to monetary damages, so far departs from accepted principles of judicature as to call for this Court's writ of *certiorari*.

CONCLUSION.

For the reasons suggested in the foregoing Petition and urged in this Supporting Brief, it is respectfully submitted that this Court should grant its writ of *certiorari* to review and reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX.

On April 1, 1924, petitioner owned a tract of land on Randolph Street in Chicago's loop (Tr. 4, Par. 7). John R. Thompson, now deceased, separately owned an adjoining tract of land (Tr. 151; Ex. Q). Thompson's personal representatives, who stand in his shoes, will for simplicity be called "Thompson".

On that day petitioner demised its tract to a now extinct corporation, United Masonic Temple Corporation, for a term of 77 years (Ex. A; Tr. 50). By a separately executed, but similar lease, Thompson similarly demised his separately owned tract to the same lessee (Ex. Q; Tr. 151).

Each lease required that United should erect upon the two separate but adjacent tracts a building which, though it was to be structurally and functionally integrated, nevertheless was to be so constructed that any time thereafter it could be transformed into two separate buildings on the properties of the two lessors, respectively, without too great expense. Such a building was erected and is now standing (Ex. A, Tr. 58, Par. Sixth; E. Q, Tr. 155). Language in petitioner's 1924 ground lease, identical with corresponding language in the Thompson lease, is quoted in the margin.[1]

[1] Section 12 of the 1924 Metropolis ground lease (Exh. A, Tr. 76) is as follows:

"Twelfth. Said Lessee further covenants and agrees to and with said Lessor that if default shall at any time be made by said Lessee or its assigns in the payment of the rent or any installment or part thereof at the time when the same shall be due and payable to the said Lessor as herein provided, and such default shall continue for a period of ninety (90) days after notice thereof in writing to the said Lessee, or if default shall be made in any of the other covenants herein contained to be kept, observed and per-

In 1935 the respondent, 32 West Randolph Street Corporation, which we hereafter call "Randolph", became the successor lessee under each of these two leases by a single document executed by Randolph and the two lessors (Ex. B, Tr. 89). This instrument explicitly, meticulously and unambiguously affirmed and preserved the separate ownership by each lessee, respectively, of its or his tract of land and so much of the building as stood thereon (Ex. B, j, Tr. 94).

This instrument was deliberately executed by each of the two lessors in full contemplation and recognition of the practical implications of separate ownership of separate parts of the same building and represented their deliberately conceived intention to preserve (1) the separate character of their reversionary estates, (2) their separate rights to terminate their respective leases separately for specified defaults, and (3) their separate rights, upon termination, separately to re-enter their respective portions of the building.

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formed by the Lessee or its successors or assigns, and such default shall continue ninety (90) days after notice thereof in writing to the said Lessee, it shall and may be lawful for the Lessor at its election to declare the said term ended and the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said Lessee and every other person occupying or being in or upon the same to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in its first and former estate.

The said Lessee hereby waives any demand for the possession of said premises in the event of the forfeiture of this lease, * * *."

The 1924 Thompson ground lease contains the same provision (Exh. Q, Tr. 155, last paragraph).

Section Nineteenth of the Metropolis 1924 Lease (Exh. A, Tr. 81) provides:

"Nineteenth. The said Lessee further covenants and agrees to and with the said Lessor that upon the termination of this lease by forfeiture or lapse of time that the said Lessee will at once surrender and deliver forthwith to the Lessor the above described premises together with all of the improvements thereon and that all the buildings, fixtures and improvements then standing upon the said demised premises and all securities or sums of money held by the Lessor or by any trustee for the benefit of the said Lessor shall belong to the said Lessor and that no compensation shall be allowed or paid therefor, except as hereinafter set forth."

The same clause is in the Thompson 1924 Lease (Exh. Q, Tr. 156).

In 1939 the then lessee, Randolph, being heavily in default to each lessor, the two lessors separately executed amendments to their 1924 leases whereby they forgave all past defaults and again preserved explicitly and emphatically their separate real estate interests and their separate rights to recover possession of their respective lands and the separable part of the building thereon in case of specified future defaults (Ex. C, Section 13, Tr. 110; Ex. Q, Tr. 155).

The recitals in these amendments expressly recognized the practical problem then existing of the two lessors as to whether they should for the future fuse their respective rights, including the right to regain possession of their respective properties, or, on the other hand, should preserve them separately or in the future as they had since 1924 (Ex. C, Tr. 97; Ex. Q, Tr. 155). Their decision in 1939 to preserve their real estate rights separately, including the right separately to regain possession of their separate properties, was reflected by express provisions in each of the separate amendments (Ex. C, Tr. 97; Ex. J, Tr. 155). Language from the 1939 Metropolis Amendment to the ground lease, identical with corresponding language in the Thompson Amendment to its separate lease, is quoted in the margin.[2]

Thus, from 1924 to the present time, the separate leases of the two lessors have contained provisions, twice

---

[2] The 1939 Metropolis amendment to the 1924 Metropolis ground lease provides (Exh. C, Tr. 98):

"Now, Therefore, in consideration of the premises and in further consideration of the simultaneous execution and delivery by Thompson Estate to Randolph of an instrument of amendment, alteration, and modification as aforementioned, Metropolis Theatre Company hereby agrees with Randolph that * * *."

"Section 13. Except to the extent expressly and specifically modified herein, all of the terms, covenants, conditions, and provisions of said Metropolis sublease shall remain in full force and effect." (Tr. 110)

The 1939 Thompson amendment contains the same provision (Exh. R, Tr. 169).

explicitly reaffirmed, preserving the rights of the two lessors separately from each other and affirming the right of each lessor separately to terminate his lease in case of specified defaults.

On December 8, 1945, the respondents Barkhausen and Boren, doing business as the partnership of Doubleby & Co., induced the lessee of the petitioner and of Thompson to execute an assignment, in violation of the express covenants of the two leases, of Randolph's lessee interest in each of the 1924 leases as amended in 1939, to said Barkhausen and Boren's nominee, Brash, another respondent herein (Compl. Par. 30, Tr. 10; see Ex M-1, Tr. 134). The actual assignments were dated January 29, 1946 (Ex. E, Tr. 115; Ex. F-1, Tr. 118; Ex. F-2, Tr. 118).

On that day Randolph (lessee of petitioner and Thompson) delivered possession of the premises demised by each lease, including the large building thereon, to Brash, the nominee of Barkhausen and Boren. Since January 29, 1946, the respondents, Barkhausen and Boren, have been in possession of the operation (through their nominee) of this large building and have received all of the profits and income of the building up to the present time (Complt. Pars. 51, 52, 53, 54, 43, 5, 34).

On December 8, 1945, petitioner's lessee, Randolph, executed a purported assignment of the lease of a theatre (which is part of the building) to the respondent corporation, Oriental Entertainment Company, which had been organized for that purpose by Barkhausen and Boren (Ex. D, Tr. 112; Complt. Pars. 37, 40, 41). This was done notwithstanding the fact that the theatre lease which was thus assigned on December 8, 1945, had been legally extinct since February 25, 1941, when the sub-

lessee under it had abandoned possession of the theatre to Randolph's nominee and at Randolph's direction executed the assignment of the sub-lease dated February 25, 1941 and accepted the possession of the theatre (Complt. Pars. 23, 25, 26).

It is pursuant to this purported assignment dated December 8, 1945 of the theatre sub-lease that the respondent Oriental Entertainment Corporation has had possession since December 8, 1945 of the theatre and has received all of the profits from the operation of the theatre (Complt. Pars. 37, 40, 41).

Respondents have, since December 8, 1945, tendered to petitioners and Thompson "as rent" moneys in purported conformity with the extinct theatre lease and in purported compliance with the provisions of the ground leases (Complt. Par. 51, Tr. 15). Petitioner and Thompson have separately and consistently in each instance refused to accept any rents from any of the respondents, taking the legal position that all of said purported assignments were invalid, that they constituted breaches of the lease and worked a defeasance of the lessees' tenure, and that the said respondents held possession of the separate property of the petitioner and Thompson as trespassers (Complt. Pars. 48, 49, 50, 51, Tr. 14 and 15).

Hence, for the past three years these trespassers have been receiving all of the profits and income of both the building and the theatre portion of the building; and neither petitioner nor Thompson has received any part thereof, nor any rent therefor (Complt. Par. 48, Tr. 14).

On November 10, 1938, petitioner entered into a letter-agreement with Southern (the then lessee under the Theatre lease) agreeing to recognize the tenancy of South ern (1) if Randolph's lease should be terminated for

Randolph's default, and (2) so long as Southern was not in default (Ex. K, Tr. 131).

In 1940, the Thompson trustees (the absent parties whose supposed indispensability is now asserted) entered into a similar letter-agreement with Southern, with similar conditions as described above in Petitioner's agreement with Southern. Thompson's letter expressly and emphatically provided that nothing therein contained should be construed so as to constitute Thompson a lessor under the theatre lease, and that Thompson should not be required to perform any of the obligations or duties of the theatre lease (Ex. S, Tr. 169).

Here again, the Thompson trustees' letter was so drafted as to preserve the Thompson legal rights and interest in their own property separate from those of petitioner; and of course so was petitioner's letter.

The complaint alleges that the theatre lease became legally extinct on February 25, 1941, as a result of Southern's abandonment of the theatre to its lessor, while heavily in default in its rent obligations (Complt. Par. 23, Tr. 8).

The agreements expressed in these two letters "died" with the end of Southern's tenancy in February 25, 1941.

Accordingly the complaint of the petitioner sought to recover possession of petitioner's land and that portion of the building on its parcel of land and to recover damages against various respondents who participated in inducing the petitioner to breach the covenants of petitioner's lease of 1924 as amended in 1939 (Complt. Par. 59, Tr. 17).

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 572

METROPOLIS THEATRE COMPANY,
a New York Corporation,

Petitioner,

vs.

L. H. BARKHAUSEN and RANDOLPH BOHRER,
etc., et al.,

Respondents.

REPLY TO ANSWER TO PETITION FOR CERTIORARI.

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I.

Respondents' answer is in substance a very strong recognition of the importance of this case.

At page 9 of Respondents' Answer, their counsel correctly impute to us the view that Federal courts

> "cannot adopt rules of procedure which have the effect of determining the limits of the jurisdiction conferred by statute."

Phrased otherwise, Respondents in effect assert that this Court *can and has intended* to adopt "rules of procedure which have the effect of determining the limits of the jurisdiction conferred by statute."

We say that this Court did not intend to state the limits of jurisdiction of District courts by its rules. We read *Sibbach* v. *Wilson*, 312 U. S. 1, as so holding in its declaration that the rules must

> "not 'abridge, enlarge, nor modify, substantive right', in the guise of regulating procedure."

Respondents' bold assertion that this Court has intended to limit jurisdiction in diversity cases by Rule 19 is the strongest possible emphasis of the importance of this case in the field of Federal jurisdiction and procedure.

Respondents' Answer further testifies to the importance of this case at page 10:

> "Any adoption of such a rule" [that is, a rule or doctrine that Federal courts must, in respondents' language at page 9, "at all times act as triers of fact under questions of state law, and cannot adopt rules of procedure which have the effect of determining the limits of the jurisdiction conferred by statute"] "would swamp the Federal Courts with business that intrinsically belongs to the state court, just such business as the instant case."

In other words, *according to respondents' own statement of the issues tendered,* this case propounds the question whether Federal courts may, under the guise of determining indispensability of parties, decline jurisdiction in diversity cases without ascertaining whether the absent parties would or would not be indispensable in a suit in the state courts.

Thus there emerges from this case a basic question in the demarcation of the concepts "substantive rights", "jurisdiction as dependent upon substantive rights", and "Federal procedure" where a suit has been dismissed for want of "allegedly indispensable parties" upon the supposition that Federal, not state, considerations of indispensability are controlling.

Respondents' depreciation as "merely procedural" of the right of a citizen of a foreign State to vindicate State rights in a Federal court starkly emphasizes the importance of the case. The federal right to prosecute State claims in a federal court is of constitutional dignity.

Petitioner says, at page 6 of its Answer:

> "At best, petitioner seeks to have this Court employ *certiorari* to force the Federal courts to consider a question of state law."

This is indeed a primary object of petitioner at this juncture of this litigation.

But precisely this object was sought and obtained in *Guaranty Trust Co.* v. *York,* 326 U. S. 99. In that case, as in this case, the Court of Appeals held that Federal, not state, law determined the availability of the Statute of Limitations as a defense to a stockholders' suit in which the substantive rights asserted arose entirely under state law, and therefore gave no consideration to the state law.

This Court granted *certiorari,* treated the case as one of capital importance in federal jurisprudence, and, without itself undertaking an appraisal of the state law, reversed and remanded to the Court of Appeals with directions to consider the case as governed by state, and not Federal, law.

II.

The Illinois law, not considered by the Court of Appeals, would have entitled petitioner to maintain this suit without joinder of the Thompson trustees.

Mindful that it is not the office of a Reply Brief to recanvass the case, we restrict this Point to a brief but, we think, incisive and conclusive demonstration that the Illinois law of joinder of parties, which the Court of Appeals disregarded because of its view that the matter of indispensability is to be tested by Federal rather than state canons of joinder, is not at all as respondents would have the Court understand it.

None of the Illinois cases cited by respondents was an action for possession of land or for damages for their wrongful occupancy or tortious interference with contract rights where the plaintiff's interest was that of sole ownership for a separate tract of land and a portion of a building situated upon such tract and an adjoining parcel. *None* of respondents' cases involved a *specific contract,* deliberately entered into, assuring such a sole owner the right separately to recover possession of his parcel of land and damages for his wrongful occupation.

Respondents content themselves with reference to the opinion of the Court of Appeals for a statement of "the only facts necessary to determine indispensability". But the Court of Appeals did not mention, and respondents deliberately avoided notice of, the *contractual* provisions in the ground lease, on which petitioner relied below and relies here for its right separately to pursue the present litigation. Those provisions are quoted in the margin in *Petitioner's Brief in Support of Petition for Certiorari,* at pages 35 to 37, inc.

Respondents' brief has made no effort to distinguish the Illinois cases of *Stevenson* v. *Bachrach*, 170 Ill. 253 and *McConnel* v. *Kibbe*, 43 Ill. 12, both cited, discussed and relied upon in petitioner's original brief here, beyond correctly stating that they are partition suits and did not involve the question of parties. Petitioner contends that these two cases are in point and are decisive of the issue in the case at bar for the following reason: In a partition suit, the plaintiff must establish that the plaintiff and the defendant are the *joint* owners of real estate which it seeks to have partitioned, sold and the proceeds distributed. If the defendant contests the basis for the cause of action, namely *joint* ownership, and on the contrary alleges that the defendant owns its property in severalty, then the plaintiff has no case for partition. This means that in the Illinois cases cited (and perhaps in all partition cases where the defendant denies joint ownership) the court is powerless to act until it first finds that there is joint ownership.

If *Bachrach* v. *Stephenson* is accepted as the law of Illinois (to the effect that adjoining owners hold their land and their portion of the building thereon separately) it follows, necessarily, that the effect of this decision is *also* that Thompson, *et al.*, are not indispensable parties to petitioner's claim for possession and damages.

North v. *Coffee*, Supreme Court of Oklahoma, 191 P. (2d) 220 (1948), cited these two cases, as well as other authority, for its statement:

> "In all the cases we have been able to find it has held that the fact that the building is upon both lots does not prevent separate ownership."

Petitioner cited below and relied upon the Illinois Ejectment statutes, the Illinois cases cited in its original brief, and the provisions of the contract giving rise to a sub-

stantive property right *separately* to sue respondents for possession of petitioner's separately owned real estate and for damages for its wrongful withholding. The Court of Appeals' view that the question raised was one of federal rather than State law prevented its consideration of the law of Illinois as controlling in deciding this case.

The Court of Appeals' refusal to consider the Illinois law as determining petitioner's right to bring this suit without the Thompson interests raises the important question that we ask this Court to take by granting certiorari in this case.

III.

Brief reply to sundry points.

Notwithstanding respondents' argument to the contrary, there is a sharp conflict in the *rationale* of the Courts of Appeal of the Seventh and Fifth Circuits, respectively, as to whether the matter of indispensability of parties in suits for the possession of real estate raises a question of Federal or of state law.

In both *McComb* v. *McCormack*, 159 F. (2) 219, and *Lawrence* v. *Sun Oil Co.*, 166 F. (2) 466, the Court of Appeals for the Fifth Circuit consulted State statutes as defining substantive property rights of the plaintiff and made the rights as thus defined a criterion of indispensability. In the instant case, however, the Court of Appeals cited and considered, not the Illinois Ejectment statutes or the Illinois cases relied upon by petitioner, but its declaration in *DeKorwin* v. *First Natl. Bank*, 156 F. (2) 858, that

> "indispensability must be determined by Federal rather than local rule".

Respondents totally misconceive this Court's teachings in *Indianapolis* v. *Chase National Bank*, 214 U. S.

63, as declaring a doctrine that the "principal purpose of the suit and the primary controlling matter in dispute" govern the question of indispensability of parties, regardless of the state law on the subject. What this court held in that case is that where all parties are properly joined, their *alignment* will be determined by "the dominant purpose" of the suit. The Court did not hold there, nor should it approve the holding by the Court of Appeals in this case, that where jurisdiction is based upon diversity of citizenship and the Court can grant substantial relief, it should decline jurisdiction altogether because perchance it cannot grant all the relief that might be appropriate if absent parties were joined.

Neither the claim for possession nor the claim for damages requires the presence of the Thompson trustees. Even if the Thompson trustees would otherwise have been indispensable parties (which they were not,—see Brief in Support of Petition for Certiorari), the contractual provisions relied upon by petitioner and ignored by the Court of Appeals amount to an agreement that they need not be joined.

So far as the claim for damages is concerned, the Thompson trustees are not legally interested. No adjudication requiring respondents to pay petitioner moneys could possibly affect Thompson's rights or interests. If, as petitioner asserts, the occupation of the premises or any part thereof is in breach of the lease and has damaged petitioner, then the tortious occupants are liable *in personam,* whether upon the theory that (A) they are trespassers or (B) that they have tortiously assisted the lessee in breaching its contract to petitioner's financial damages. The presence of the Thompson trustees is

not required in order that this question may be litigated and adjudicated.[1]

The truth is that this is a very simple case. Petitioner separately owned a parcel of land and a portion of a theatre building situated thereon. It asserted in the lower courts that under the substantive law of Illinois, it had the right to sue separately for possession of its real estate, without joinder of the trustee of the adjoining tract and the portion of the building situated thereon. It also claimed damages because the lands were occupied by persons and (made defendants) whose possession was charged to be in violation of the lease and supplemental agreements in question and who are liable for tortious participation of a breach of the covenant sued upon. Petitioner grounded its assertion upon Illinois state, Illinois Supreme Court decisions, and the provisions of its contract. The Court of Appeals has held that the matter of indispensability must be determined by Federal, not state law, (although it points to no "federal" law defining indispensability since *Erie R. R.* v. *Tomkins*, 304 U. S. 64), and has refused to give consideration to petitioner's claim of a substantive right separately to sue for possession and damages.

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[1] Petitioner's right to collect damages for tortious interference with its contractual rights is not dependent upon forfeiture. (see Appendix to Petitioner's Brief, p. 40, last par.).

Conclusion.

Petitioner, for the reasons alleged in its Petition for Certiorari, its Brief in Support of that Petition, and this Reply Brief, asks this Court to grant its writ of certiorari in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 572

METROPOLIS THEATRE COMPANY,
A NEW YORK CORPORATION,
Petitioner,

vs.

L. H. BARKHAUSEN AND RANDOLPH BOHRER,
ETC., ET AL.,
Respondents.

ANSWER TO PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF THE ANSWER.

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INDEX.

Authorities Cited.

List of Cases.

Statutes.

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ETC., ET AL.,

Respondents.

ANSWER TO PETITION FOR CERTIORARI.

PRELIMINARY STATEMENT.

Petitioner, a New York corporation, filed its complaint seeking equitable relief to forfeit a ground lease which has more than fifty years to run; to deprive the lessee of the ownership and possession of a building which lessee erected at a cost in excess of $2,900,000; to destroy a mortgage which secures leasehold bonds in excess of $2,000,000 and to nullify a valuable theatre lease having an unexpired term of eighteen years.

Jurisdiction of the Federal Court is based on diversity of citizenship. Petitioner is a New York corporation and

all of the respondents are citizens of Illinois, with the exception of Essaness Theatres Corporation, which is a Delaware corporation. Respondents contend that the Trustees of the Thompson estate (hereinafter referred to as the "Thompson Lessors" or "Thompson") are indispensable parties and, if joined, would be aligned on the side of the petitioners. Since the Thompson lessors are citizens of Illinois, the joinder of the Thompson lessors destroys the requisite for diversity of citizenship.

The opinion of the court below is based on the allegations of the complaint and the affidavits and exhibits filed in support of respondents' motion to dismiss. The trial court dismissed the complaint, and the Court of Appeals affirmed, on the grounds that the Thompson lessors are indispensable parties and, if joined, would be aligned as a party plaintiff and would destroy the diversity of citizenship, thereby requiring the dismissal of the suit for want of jurisdiction.

Answer to So-Called "Summary and Short Statement of the Matter Involved."

This case is one involving the appropriate application of Rule 19 of the Federal Rules of Civil Procedure. Has petitioner failed to join an indispensable party who, if joined, would destroy the diversity requisite for Federal jurisdiction? The lower courts determined that, under Rule 19, the absent party was indispensable (170 F. (2d) 481).

The petition for certiorari presents only one question, but is based upon two grounds. That question, which was not raised in either the District Court or the Court of Appeals, is whether joinder of party should be determined by state or federal law.

Petitioner's two grounds are:

1. First, an alleged conflict exists between the decision of the United States Court of Appeals for the Seventh Circuit "following its declaration in *DeKorwin* v. *First National Bank*, 156 F. (2d) 858 (1946) *cert. denied*, 329 U. S. 795, 67 S. Ct. 481, 91 L. Ed. 980 (1946) that

> 'indispensability must be determined by federal rather than local rules' "

and the decision of the Court of Appeals for the Fifth Circuit in *McComb* v. *McCormack*, 159 F. (2d) 219 (1947) (Petitioner's brief, Pages 2-4).

Nowhere in the opinion of the Court of Appeals in the instant case is there any statement that indispensability must be determined by federal rather than local rules. Nor is there anything in the opinion which indicates that the Court disregarded Illinois law. The Court of Appeals said in its opinion that:

> "Whether the Thompson lessors are indispensable parties must be determined from all the facts in the case, and the nature of the relief sought." (Tr. 207.)

The only question therefore is whether Thompson is an indispensable party within the purview of Rule 19 of the Federal Rules of Civil Procedure.

In a previous case to be sure, *DeKorwin* v. *First National Bank*, 156 F. (2d) 858 (1946), the Court of Appeals for the Seventh Circuit did hold that indispensability must be determined by federal rather than local rules. But no conflict exists between the decisions of the Seventh Circuit and the decisions of the Fifth Circuit. In fact the Court of Appeals for the Fifth Circuit in a case decided on February 20, 1948, after the *McComb* case, cited and relied upon the very Seventh Circuit case that petitioner claims created the conflict. In *Lawrence* v. *Sun Oil Co.* (C. C. A. 5,

1948), 166 F. (2d) 466, 469, the Court of Appeals for the Fifth Circuit said:

> "Procedure in the federal courts is governed by the Federal Rules and not by the local law. 17 Hughes, Federal Practice Jurisdiction & Procedure, § 18518. This is particularly true in diversity cases where the question of indispensability of absent parties arises. It is now settled we think that in such cases the rule as to indispensability of absent parties must be determined by federal rather than by local law. *DeKorwin* v. *First National Bank of Chicago*, 7 Cir., 156 F. 2d 858; *Chicago, M., St. P. & P. R. Co.* v. *Adams County, et al.*, 9 Cir., 72 F. 2d 816."

2. The second ground for certiorari raised by petitioner is that the Court of Appeals for the Seventh Circuit has so far departed from historical principles of joinder as to call for certiorari. Two arguments are made in support of this ground; first, that Illinois law, differing from the "Federal law" would not require the joinder of the Thompson trustees; and second, that, by requiring such joinder, the petitioner has been deprived of a valuable right.

Neither of these arguments is sound. In the first place, the Illinois rule is identical with the rule enunciated by the Court of Appeals for the Seventh Circuit in this case, and by this Court in *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47 (1941) to the effect that all persons possessing a substantial interest in the subject matter of the litigation and who will be affected by the decree must be made parties to the suit.

Texas Company v. *Hollingsworth*, 375 Ill. 536 (1941).

Oglesby v. *Springfield Marine Bank*, 385 Ill. 414 (1944).

Georgeoff v. *Spencer*, 400 Ill. 300 (1948).

Gaumer v. *Snedeker*, 330 Ill. 511 (1928).

Stripe v. *Yager*, 348 Ill. 362 (1932).

Secondly, the decision of the Court of Appeals for the Seventh Circuit has no effect on the substantive rights of the petitioner. It is not denied by the Court of Appeals that each of two lessors in the instant case has the legal right separately (a) to terminate the respective lease and (b) to re-enter his separate premises in the event of certain specified defaults. The only effect of the decision below is to require petitioner to enforce its rights in the state court. Petitioner's suit asks the court to decree that two leases have been forfeited or terminated. The only question is whether the Court of Appeals correctly refused to exercise its equitable powers in the absence of persons who have a vital interest in the controversy. The Circuit Court held that under the facts and circumstances of the case the Thompson lessors has such a vital interest in the controversy as to make them indispensable parties for the Court to hear and determine the controversy. In reaching this decision, the Court of Appeals followed the rulings of this Court.

Healy v. *Ratta*, 292 U. S. 263, 78 L. Ed. 1248 (1934).
Indianapolis v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47 (1941).
Niles-Bement-Pond Co. v. *Iron Moulders Union*, 254 U. S. 77, 65 L. Ed. 145 (1920).

All of petitioner's arguments based upon "importance" and "departure from historic principles of joinder" fall when it is recognized that petitioner has lost no *rights* by the decision herein. The Court of Appeals for the Seventh Circuit affirmed a decision of the District Court holding that a certain absent party was "indispensable", and, if joined properly, would destroy the diversity requisite for Federal jurisdiction. The petitioner is thus returned to the Courts of Illinois for the determination of an issue which is particularly appropriate for state court determina-

tion; *i. e.*, the existence of a right of forfeiture in a ground lessor under an Illinois lease agreement. At best, petitioner seeks to have this Court employ certiorari to force the Federal courts to consider a question of state law.

This case is definitely not of general importance. The Court of Appeals correctly applied the rules of joinder which have their roots in the common law, but, even if these rules had not been correctly applied to the facts of this particular case, the case does not thereby become generally important. The Court of Appeals did not announce a rule that the historic principles of joinder should be ignored. Instead, that Court correctly applied those principles to the facts of this case.

Statement of the Facts.

The only facts necessary to determine indispensability are set forth in the opinion of the Court of Appeals for the Seventh Circuit (Tr. 202-205, fn.). They are summarized hereinbelow at pages 12 to 15.

BRIEF IN SUPPORT OF ANSWER TO PETITION FOR CERTIORARI.

I.

There Is No Conflict Between the Decisions of the Court of Appeals for the Seventh Circuit and Those of the Court of Appeals for the Fifth Circuit. The Federal Courts Have Unanimously Held That Federal Law, Not State Law, Governs the Disposition of Procedural Questions Such as Indispensability of Parties.

(a) Nowhere in the opinion of the Court of Appeals in the instant case is there any statement that indispensability must be determined by federal rather than local rules. Nor is there anything in the opinion which indicates that the Court disregarded Illinois law. The Court of Appeals said in its opinion that:

> "Whether the Thompson lessors are indispensable parties must be determined from all the facts in the case, and the nature of the relief sought." (Tr. 207.)

The only question therefore is whether Thompson is an indispensable party within the purview of Rule 19 of the Federal Rules of Civil Procedure.

In a previous case to be sure, *DeKorwin* v. *First National Bank*, 156 F. (2d) 858 (1946), the Court of Appeals for the Seventh Circuit did hold that indispensability must be determined by federal rather than local rules.

(b) No conflict exists between the rule adopted by the Court of Appeals for the Seventh Circuit and that followed by the Court of Appeals for the Fifth Circuit, nor with respect to the teachings of this Court. Petitioner argues

that the instant case finds the Court of Appeals for the Seventh Circuit affirming its decision in *DeKorwin* v. *First National Bank,* 156 F. (2d) 858 (1946) *cert. denied* 329 U. S. 795, 67 S. Ct. 481, 91 L. Ed. 980 (1946), to the effect that indispensability of parties must be determined by federal rather than local rules. This is also the rule in the Fifth Circuit. *Lawrence* v. *Sun Oil Co.,* (C. C. A. 5, 1948), 166 F. (2d) 466, citing the *DeKorwin* case *with approval* at page 469. No more certain evidence of lack of conflict could be found than to have one Circuit cite and rely upon the very decision in the other Court alleged to create the conflict.

See also *Keegan* v. *Humble Oil & Refining Co.* (C. C. A. 5, 1946), 155 F. (2d) 971, and *Calcote* v. *Texas Pacific Coal & Oil Co.,* (C. C. A. 5, 1946), 157 F. (2d) 216 (*cert. denied* 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671 (1946)).

In *McComb* v. *McCormack,* (C. C. A. 5, 1947) 159 F. (2d) 219, the case which petitioner cites as in conflict with the rule in the Seventh Circuit, the Court did not consider what law controlled under Rule 19 as to indispensability, since it was not required to do so. When that Court was later required to face this precise issue, it unequivocally adopted the rule of the Seventh Circuit. The contention that a conflict exists is frivolous.

II.

The Decision of the Court of Appeals for the Seventh Circuit In No Way Affects the Rights of Petitioner.

(a) The outcome on the merits in the instant case is in no sense involved. Accordingly, the rights of the petitioner are in no way involved and *Erie R. R.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938); *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 85 L. Ed. 479 (1941); and *Guaranty Trust*

Co. v. *York,* 326 U. S. 99, 89 L. Ed. 2079 (1945), are not called into the ambit of this Court's decision.

Petitioner has confused the outcome of litigation with the rules of procedure which Federal courts have adopted to permit the orderly operation of a judicial system having powers concurrent with the state court system. In what manner or with whom one may sue is not in any manner identical with what the result of a suit may be. The fact that the Federal Court requires petitioner to join as a party the Thompson lessors, who it is asserted would not be indispensable in an identical action in the state courts, does not state a ground for certiorari. Petitioner has attacked not a *result,* but a rule of procedure, established by this Court pursuant to an Act of Congress. 48 Stat. 1064, 28 U. S. C. § 7236.

Petitioner's argument rests upon the assertion that petitioner had "the right to vindicate in the federal courts its rights *in rem* and *in personam*" (Petitioner's Brief, p. 22) and that the lower courts had a duty "to recognize that under the Illinois law petitioner's title was separate and to ascertain whether under Illinois law petitioner might therefore sue respondents without joinder of the Thompson trustees" (Petitioner's brief, p. 29). But petitioner did not have a *right* of any kind in the Federal Court unless that Court had jurisdiction. And it is perfectly obvious that federal jurisdiction will not be found wherever state jurisdiction exists. It is equally obvious that the answer to the procedural question presented by this case will not be made to depend upon state law simply because that answer has the effect of settling the question of federal jurisdiction.

Petitioner's contention is simply a statement that the federal courts must at all times act as triers of fact under questions of state law, and cannot adopt rules of procedure which have the effect of determining the limits of

the jurisdiction conferred by statute. That this is not the law is clear. Any adoption of such a rule would swamp the Federal Courts with business that intrinsically belongs to the state court, just such business as the instant case. See: *Healy* v. *Ratta*, 292 U. S. 263, 78 L. Ed. 148 (1934); *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47 (1941).

III.

The Decision of the Court of Appeals For the Seventh Circuit Is In Accordance With Historic Concepts of Joinder.

(a) In the exercise of its rule-making power this Court approved the promulgation of the Federal Rules of Civil Procedure. In applying those rules the Court has many times had occasion to concern itself with a definition of indispensable parties. The instant case is one decided upon Rule 19 of the Federal Rules of Civil Procedure.

Rule 19 is merely declaratory of the law as it existed before the adoption of the rule. Neither the Court of Appeals in the instant case, nor any other Federal Court, has ever indicated that this rule departed from "the historic principles of joinder." In *United States* v. *Washington Institute of Technology* (C. C. A. 3, 1943), 138 F. (2d) 25, 26, the Court stated:

> "Rule 19(a) of the Rules of Civil Procedure, 28 U. S. C. A., following section 723c requires that those having 'a joint interest shall be made parties * * *.' This means those who are indispensable parties prior to the rules. 2 Moore's Federal Practice (1938), Section 19.02."

See also:

> *Society of European Stage Authors & Composers* v. *W. C. A. U. Broadcasting Co.* (E. D. Pa. 1940), 1 F. R. D. 264, 266.

Wesson v. *Crain* (C. C. A. 8, 1948), 165 F. (2d) 6.
Shell Development Co. v. *Universal Oil Products Co.* (C. C. A. 3, 1946), 157 F. (2d) 421, 424.
Currier v. *Currier* (S. D. N. Y., 1941), 1 F. R. D. 683, 684.
Spanner v. *Brandt* (S. D. N. Y., 1941), 1 F. R. D. 555, 556.

(b) Indispensable parties are persons who have an interest in the controversy of such a nature that a final decree without them cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

The test of an indispensable party is well expressed in *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80, 65 L. Ed. 145, 147, (1920), wherein this Court stated:

> "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not, but a rule early announced and often applied by this court is sharply applicable to the case at bar. In *Shields* v. *Barrow*, 17 How. 130, 139, 15 L. ed. 158, 160, this language quoted with approval in *Barney* v. *Baltimore*, 6 Wall. 280, 284, 18 L. ed. 825, 826, and again in *Waterman* v. *Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, 48, 54 L. Ed. 80, 86, 30 Sup. Ct. Rep. 10, was used to describe parties so indispensable that a court of equity will not proceed to final decision without them, viz.:
>
> 'Person who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience'."

The rule so expressed has been followed by the Court of Appeals for the Seventh Circuit in *DeKorwin* v. *First*

National Bank (C. C. A. 7, 1946), 156 F. (2d) 858, *cert. denied* 329 U. S. 795, 67 S. Ct. 481, 91 L. Ed. 980 (1946). See also, *Montfort* v. *Korte* (C. C. A. 7, 1938), 100 F. (2d) 615, 617, *cert. denied* 306 U. S. 659, 59 S. Ct. 791, 83 L. Ed. 1056 (1939), wherein the Court said:

> "'After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?'"
>
> "It then determined that if all four questions could be answered in the affirmative with respect to the interest of the absent party, then such party is a necessary one. If any one of the four questions, however, is answered in the negative, then the absent party is indispensable."

To the same effect are

State of Washington v. *United States* (C. C. A. 9, 1936), 87 F. (2d) 421.

Baird v. *Peoples Bank & Trust Co.* (C. C. A. 3, 1941), 120 F. (2d) 1001.

Wesson v. *Crain* (C. C. A. 8, 1948), 165 F. (2d) 6.

Keegan v. *Humble Oil & Refining Co.* (C. C. A. 5, 1946), 155 F. (2d) 971, 973.

(c) The Thompson lessors are indispensable parties to this case.

Whether the Thompson lessors are indispensable parties must be determined from all the facts in the case.

A single 22-story office and theatre building has been erected on the adjoining properties of Metropolis and

Thompson by the lessee under the ground lease, pursuant to the provisions of both the Metropolis and Thompson leases, at a cost exceeding $2,,900,000. Both leases were executed concurrently, contain substantially the same provisions except for differences in the amount of rental, and run for a term of 77 years from May 1, 1924 to April 29, 2001 (Tr. 50-88, Ex. A; Tr. 151-156, Ex. Q). Reference to the Thompson lease is made in the Metropolis lease and vice versa.

In 1935 both leases were amended by a single document executed by petitioner, Thompson and the lessee (Tr. 89-95, Ex. B).

In 1939 the two leases were again amended by substantially similar agreements (Tr.. 95-111, Ex. C; Tr. 157-169, Ex. R). Though separate amendatory agreements were signed for each lease, each agreement expressly provided that it was being executed in consideration of the execution of the other agreement. The amendment to the Thompson lease is attached as an exhibit to the Metropolis amendment, and vice versa.

The Metropolis amendment contains the following recital (Tr. 97, Ex. C):

> "Whereas there has been erected upon the demised premises and on the Thompson premises by the original Lessee under each of said indentures of lease, pursuant to the permissive sections thereof, a twenty-two story building which is so constructed that it forms a complete structure located on the premises demised by both indentures of lease, and in the event of a default under either or both of said indentures of lease, neither part of said building could be operated separately from the other without the expenditure of considerable money by the owner or owners of the Lessor's interest under each of said leases."

A similar provision is contained in the Thompson amendment (Tr. 157, Ex. R).

Each agreement provides that operating expenses, repairs and maintenance of the building should be paid from the gross income of the building (Tr. 98-103, Ex. C; Tr. 159-163, Ex. R). The gross income attributable to the Metropolis tract is not to be used solely for repairs of that portion of the building situated on the Metropolis tract, nor is the gross income attributable to the Thompson tract to be used solely for the repair and maintenance of that portion of the building over the Thompson tract. There is no provision for division of gross income. The income from the building in its entirety is to be applied for the operation, repair and maintenance of the building as a single unit.

Each agreement allocates to the lessor a certain percentage of the net income from the entire property—that is, the parcels owned by Metropolis and Thompson taken as an entirety. The leases do not provide that Metropolis should receive the rent from Lots 5 and 6 owned by it, and Thompson the rent from Lot 7; but rather, each lessor receives a percentage of the aggregate net income of the building as a unit.

A default under the Thompson lease is expressly made a default under the Metropolis lease (Tr. 108, Ex. C, Sec. 8); and similarly a default under the Metropolis lease is considered a default under the Thompson lease (Tr. 166, Ex. R, Art. VI).

Accordingly, both lessors are interested in the maintenance of a common building leased to a common lessee. Both lessors are interested in a common fund—the income from the building as a single unit. Each has the right to have the gross income applied to the operation, repair and maintenance of the building as a single unit and to receive a percentage of the net income.

Furthermore, the theatre portion of the building is

located partly on the Metropolis tract and partly on the Thompson tract (see plat, Tr. 49). A single theatre sublease was executed for the entire theatre premises, and both the Metropolis tract and the Thompson tract are therein described (Tr. 123, Rec. 274, Ex. G, pp. 4, 5). A single rental is payable for the entire theatre premises (Tr. 123-124). Metropolis and Thompson each agreed to recognize the theatre sublease if the respective ground leases were terminated (Tr. 133, Ex. K; Tr. 169-170, Ex. S). In that event, Metropolis is to receive 66⅔ percent of the rental and Thompson 33⅓ percent. Upon the forfeiture of the ground leases, both Metropolis and Thompson succeed to the rights of the lessor under the theatre sublease. Both Metropolis and Thompson, therefore, have a common interest in a single rental, payable under one lease by a lessee occupying a theatre erected on both parcels. Metropolis and Thompson together have an interest in the performance by the theatre lessee of all its obligations under the lease.

If petitioner is successful in this litigation, the interests of the Thompson lessors are inevitably affected. By the respective leases and agreements hereinabove recited, Metropolis and Thompson have arranged for a cooperative use of their respective parcels, have provided for the operation, repair and maintenance of the building as a unit, and have acquired an interest in the net income of the building as a unit. The forfeiture of the Metropolis lease will unquestionably terminate such cooperative use and end the arrangement whereby Thompson possesses an interest in the income from the building as a unit.

As to the theatre sublease, we fail to see how Metropolis alone can forfeit this lease or claim its termination. There is but a single lease. Both Metropolis and Thompson succeed to the lessor's interest upon forfeiture of

the ground leases. It would certainly require the joint action of Metropolis and Thompson to declare the theatre sublease ended. But in any event, Thompson is equally interested with Metropolis in the operation of the theatre under this lease and the payment of rental thereunder. Even if Metropolis had the right to terminate this lease without the concurrent action of Thompson, certainly Thompson has such an interest in the lease as to make Thompson an indispensable party in a suit to declare the lease terminated.

The defendants here have assumed obligations under both the Metropolis and Thompson leases, as amended, and the theatre sublease. These obligations relate to the operation of the building as a unit, including the repair and maintenance thereof, and to an accounting for the net income of the building as a unit. Under the theatre sublease, the lessee has agreed to operate a theater located on both parcels and to pay a single rental. These obligations with respect to the building and the theatre run to Thompson as well as Metropolis. If this Court were to decree the termination of the ground lease and theatre lease, what would be defendants' status with respect to the Thompson lessors, who would not be bound by the decree? Such a decree would make it impossible for defendants to comply with their obligations to Thompson.

It is therefore evident that the interest of Thompson is so bound up with the interests of the other parties that the Court cannot in the absence of Thompson, render justice between the parties before it. A decree cannot be rendered without affecting the interest of Thompson. The interest of Thompson is not distinct and severable. In the absence of Thompson, a decree cannot be entered herein consistent with equity and good conscience. Each of the four questions enumerated in *Montfort* v. *Korte* (C. C. A. 7, 1938),

100 F. (2d) 615, *cert. denied* 306 U. S. 659, 59 S. Ct. 791, 83 L. Ed. 1056 (1939), hereinabove quoted (p. 12) must be answered in the negative. A negative answer to any one of these questions makes the absent party indispensable.

An interest in the income from property makes the possessor of such interest an indispensable party to a proceeding affecting such income. In *Keegan* v. *Humble Oil & Refining Co.* (C. C. A. 5, 1946), 155 F. (2d) 971, Keegan filed suit against Humble to recover an undivided interest in oil land, alleging that Humble was a trespasser. Humble had entered into agreements with Sperry and others for an overriding royalty on the oil produced. In dismissing the case because of the absence of indispensable parties, the court held, at page 973:

> "Their (Sperry, *et al.*) interest are so bound up with Humble Oil & Refining Co. that the relief prayed for in the bill divesting Humble of its leasehold would deprive them of their right to share in the oil produced."

The case of *Calcote* v. *Texas Pacific Coal & Oil Co.* (C. C. A. 5, 1946), 157 F. (2d) 216 (*cert. den.* 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671 (1946) *reh. denied* 329 U. S. 830, 67 S. Ct. 356, 91 L. Ed. 704), is also to the same effect. The lessors under an oil lease filed suit to cancel the lease. The lessors had agreed to pay an overriding royalty to certain persons not parties to the suit. These royalty grantees were not parties to the oil lease. The court ruled that the royalty grantees were indispensable parties.

Similarly, Thompson's interest in the preservation of the property also establishes the indispensability of Thompson. In *Calvert* v. *Bradley*, 57 U. S. (16 How.) 580, 14 L. Ed. 1066 (1853), the Court considered a situation where the lessee had covenanted with several lessors to keep the demised premises in repair, and where the lease set out

the proportions which the lessor owned and reserved the rent to them in those proportions. In answer to the contention that the covenant was not joint because its stipulations were with the several covenantees, severally and jointly, the Court held that all covenantees were interested in the preservation of the property demised. All lessors were held to be indispensable parties to the suit.

Other cases to the same effect are *Shields* v. *Barrow*, 58 U. S. (17 How.) 130, 15 L. Ed. 158 (1855), and *South Penn Oil Co.* v. *Miller*, (C. C. A. 4, 1909), 175 F. 729.

In the instant case, Thompson has acquired an interest in the income of both tracts as a unit, and Metropolis possesses a similar interest. Thompson, as well as Metropolis, has the right to have the gross income from the building as a unit applied to the operation, repair and maintenance of the building as a unit. Thompson and Metropolis have become privies to the theatre lease. These interests cannot be terminated by the court in the absence of Thompson.

Despite petitioner's assertions to the contrary, the federal rule is only declarative of the rule in force in Illinois.

IV.

The Illinois Law Requires That the Thompson Lessors Be Joined In a Suit Such as Is Here Brought by Petitioners to Forfeit Valuable Leases In Which the Thompson Lessors Have a Vital Interest.

(a) The Illinois rule provides that all persons possessing a substantial legal or beneficial interest in the subject matter of the litigation and who will be affected by the decree must be made parties to the suit.

In *Georgeoff* v. *Spencer* (1948), 400 Ill. 300, the Supreme Court of Illinois said at pages 302-3:

"From the facts appearing upon the face of the com-

plaint and counterclaim it is apparent that the assignees, representatives, or heirs of Joseph Spencer are persons who have an interest in the subject matter of the lawsuit. It also appears that God's Voice Spiritual Association, Inc., may have a beneficial interest of some sort. These are necessary and essential parties to the litigation. It has also been said that a necessary party is one who has such an interest in the matter in controversy that it cannot be determined without either affecting that interest or leaving the interest of those who are before the court in a situation that might be embarrassing and inconsistent with equity. *Commonwealth Trust Co. of Pittsburgh* v. *Smith*, 266 U. S. 152, 69 L. ed. 219.

"When omission of necessary parties is noted the ordinary procedure is for the court to stop further proceedings. (*Texas Co.* v. *Hollingsworth*, 375 Ill. 536; *McMechan* v. *Yenter*, 301 Ill. 508.) The chancellor erred in undertaking to pass upon the merits of the case when necessary parties to relief upon the complaint, as well as upon the counterclaim, were not before the court."

Language identical to this, but using the word "indispensable" as an alternative to the word "necessary", is found in *Stripe* v. *Yager* (1932), 348 Ill. 362.

See also *Texas Co.* v. *Hollingsworth* (1941), 375 Ill. 536, *Oglesby* v. *Springfield Marine Bank* (1944), 385 Ill. 414, and *Gaumer* v. *Snedeker* (1928), 330 Ill. 511.

This is the rule of law identical with that of the Court of Appeals for the Seventh Circuit, of the Court of Appeals for the Fifth Circuit, and of this Court.

Petitioner cites but two Illinois cases to establish the Illinois law which, it is claimed, would give petitioner the right to sue without joining the Thompson lessors.

The case of *Stevenson* v. *Bachrach* (1897), 170 Ill. 253, is not in point. The Illinois Partition Act 1947 Ill. Revised Statutes chap. 106, section 1, provides that when

land is held in joint tenancy, tenancy in common, or co-parcenary, any party interested may compel a partition thereof by bill in chancery. The court held that the statute does not apply to separate owners of adjoining parcels of land improved with a common building, because the ownership was not that of joint tenants, tenants in common, or co-parcenors. That case did not involve the point of necessary parties, since the owners of both parcels were parties to the case. The instant case is not a partition suit and the *Stevenson* decision is not applicable.

The case of *McConnel* v. *Kibbe* (1867), 43 Ill. 12, is also a partition suit and is identical with the *Stevenson* case.

The cases and statutes which plaintiff cites having to do with ejectment are not here in point. Petitioner insists upon confusing the right to recover with the equitable relief demanded and its effect upon a vital right of the Thompson lessors.

V.

In Determining the Question of Indispensability of Parties, the Principal Purpose of the Suit and the Primary and Controlling Matter in Dispute Govern. In the Instant Case, the Primary and Controlling Matter Is the Forfeiture of the Leases. All Other Relief Is Dependent Upon and Incidental to This Primary Controversy.

Petitioner has argued at Points III, IV and V (Petitioner's brief, Pages 26, 29 and 32) as if the existence of a damage claim were sufficient to remove the indispensability of the Thompson lessors. As a matter of fact, no damage claim is involved in the instant action. What petitioner incorrectly refers to as a damage claim is instead a claim for an accounting, which is only ancillary to the main prayer for relief. The primary and controlling matter in the suit as far as either petitioner, or the Thompson

lessors, are concerned, is the forfeiture of the ground lease and the theatre lease.

If the Court refuses to declare such forfeiture, all other relief must likewise be denied. Petitioner's claim for an accounting is conditioned upon the Court's determination that the ground lease and theatre lease have been terminated. If the Court determines that petitioner cannot terminate these leases, petitioner's claim for an accounting of the profits has no basis. Petitioner will then be limited to the rentals specified in the ground lease, which have been tendered and refused. The accounting is merely incidental to the dominant controversy.

The complaint here is much more than a complaint in ejectment and for damages. It seeks a decree cancelling the Metropolis lease and the theatre sublease, directing the surrender of the demised premises to petitioner, enjoining the defendants from interfering therewith, and removing the various leases as clouds on petitioner's title.

Here again the prayer for possession is incidental to the dominant controversy—the forfeiture of the leases. Petitioner's right to possession is conditioned upon the forfeiture of the leases. If the court refuses to decree a forfeiture of the leases, then petitioner's claim to possession falls.

It is immaterial that Thompson would not be entitled to the same relief in every respect as Metropolis. As stated in *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69, 86 L. ed. 47, 50 (1941):

> "Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests' * * * exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit' * * * and the 'primary and controlling matter in dispute * * *.'"

In that case, a mortgage trustee sued the mortgagor and others to establish the validity of a lease and to collect interest on the mortgage bonds. The mortgagor, who was liable for the interest, was aligned by the court on the same side as the mortgagee, because the primary and controlling matter in dispute was the validity of the lease which the mortgagee and mortgagor both affirmed and the other parties denied.

Petitioner relies upon the doctrine of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188 (1938). The case holds that the federal courts are bound to apply the substantive law of the states. This, however, has no application to the question of the jurisdiction of the federal courts, which is determined entirely by federal statute.

The alignment of the Thompson lessor with plaintiff in this case is not challenged. Petitioner does not question the decision of the Court of Appeals that petitioner and Thompson should be aligned on the same side.

Conclusion.

For the reasons and arguments set forth above, it is respectfully submitted that this court should deny the petition for certiorari heretofore filed herein.

Respectfully submitted,

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